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State v. Pearson and State v. McClendon: Determining Reasonable, Articulable Suspicion from the Totality of the Circumstances in North Carolina

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State v. Pearson and *State v. McClendon*: Determining Reasonable, Articulable Suspicion from the Totality of the Circumstances in North Carolina

The purpose of a "stop and frisk" is simple and rational: it allows police officers investigating potential crimes to detain an individual temporarily while assuring themselves that the detainee is not armed and dangerous.[1] Despite the utility of such measures, however, law enforcement officers' authority to conduct stops and frisks is in constant tension with the Fourth Amendment, which protects individuals from "unreasonable" governmental searches and seizures.[2] Under the Fourth Amendment, searches and seizures normally are permitted in two situations: (1) when a magistrate issues a warrant in advance of the search and seizure; and (2) when a police officer in the line of duty has probable cause to believe that criminal activity is afoot and that a search is needed to protect the safety of the officer.[3] Stops and frisks, in contrast, often occur on city streets in "rapidly unfolding and often dangerous situations"[4] in which time constraints render the issuance of warrants impractical,[5] and the risk of injury from concealed weapons makes waiting for probable cause

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1. *See* Terry v. Ohio, 392 U.S. 1, 23 (1968).
2. The Fourth Amendment provides:

   > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; *see also id.* amend. XIV, § 1 (requiring states to provide due process); Mapp v. Ohio, 367 U.S. 643, 656–57, 660 (1961) (incorporating Fourth Amendment protections into the Fourteenth Amendment due process guarantee). The principal remedy for Fourth Amendment violations is the exclusionary rule. *See* RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE § 7, at 604 (3d ed. 1995). The rule operates to exclude evidence from trial that has been obtained illegally or unconstitutionally through government actions. *See id.* The Supreme Court first articulated this rule in *Weeks v. United States*, 232 U.S. 383, 398 (1914), and made it applicable to Fourth Amendment cases in *Mapp*, 376 U.S. at 655.

3. *See* ALLEN ET AL., *supra* note 2, § 7, at 625.
4. *Terry*, 392 U.S. at 10.
5. *See* Mincey v. Arizona, 437 U.S. 385, 392–93 (1978) ("[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation' . . . ." (quoting *Terry*, 392 U.S. at 26)); Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (holding that the exigency stemming from "hot pursuit" of a suspect when probable cause existed justified a warrantless search of house).

to develop inordinately dangerous for police.[6]

In *Terry v. Ohio*,[7] the United States Supreme Court responded to police officers' need for safety and flexibility by recognizing a narrow exception within the framework of Fourth Amendment case law.[8] The Court held that stops and frisks without either warrants or probable cause are nonetheless constitutional when police officers have a reasonable, articulable suspicion that criminal activity is afoot and that the individuals involved in that activity are armed and dangerous.[9] This exception to the warrant requirement of the Fourth Amendment is commonly known as the *Terry* Doctrine.

The threshold phrase "reasonable, articulable suspicion" is not self-defining[10] and has caused confusion and disagreement in the thirty years since *Terry*. *State v. Pearson*[11] and *State v. McClendon*,[12] cases recently decided by the North Carolina Supreme Court, highlight the difficulties in applying the *Terry* Doctrine. The cases involved strikingly similar fact patterns, yet produced divergent outcomes. The supreme court deviated from the traditional application of the *Terry* Doctrine in *Pearson*, but attempted to restore the application to its original, intended formula in *McClendon*. This Note discusses North Carolina courts' application of the *Terry* Doctrine in the context of these two cases.

First, this Note presents the facts of *Pearson* and *McClendon*, including their procedural histories at trial and on appeal.[13] The Note then reviews the development of the *Terry* Doctrine at both the federal and state levels.[14] Next, it addresses the differences between the *Pearson* and *McClendon* decisions, with an emphasis on the analyses of the cases in light of applicable precedent.[15] Finally, the Note recommends that the North Carolina courts take a more consistent approach in applying the *Terry* Doctrine and in evaluating the nervousness displayed by suspects during police stops in order to avoid confusion in future judicial decisions.[16]

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6. *See Terry*, 392 U.S. at 23–24.
7. 392 U.S. 1 (1968).
8. *See id.* at 9–10; *see also* Dunaway v. New York, 442 U.S. 200, 208–09 (1979) (characterizing *Terry* as recognizing an exception to the probable cause requirement of the Fourth Amendment).
9. *See Terry*, 392 U.S. at 27; *id.* at 32–33 (Harlan, J., concurring).
10. *See* United States v. Cortez, 449 U.S. 411, 417 (1981).
11. 348 N.C. 272, 498 S.E.2d 599 (1998).
12. 350 N.C. 630, 517 S.E.2d 128 (1999).
13. *See infra* notes 17–84 and accompanying text.
14. *See infra* notes 85–127 and accompanying text.
15. *See infra* notes 128–78 and accompanying text.
16. *See infra* text accompanying note 179.

The incident at issue in *Pearson* occurred in Greensboro, North Carolina, on October 12, 1994, when Trooper Timmy Lee Cardwell pulled over a vehicle on Interstate 85 after observing it travel below the posted speed limit and weave within its lane.[17] Trooper Cardwell approached the vehicle to speak with the driver, Clifton Harold Pearson, Jr., and a female passenger.[18] Upon request, Pearson produced a North Carolina driver's license and proper registration for the automobile.[19] Trooper Cardwell then asked Pearson to exit the vehicle and accompany him back to the patrol car.[20] At the patrol car, Trooper Cardwell noticed an odor of alcohol emanating from Pearson.[21] He also observed that Pearson was nervous and had a rapid heart rate.[22] In response to questions concerning these conditions, Pearson admitted to having consumed "a couple of beers"[23] and stated that he had barely slept the night before.[24] Pearson then explained that he and the passenger, his fiancée, had made a trip from Charlotte to his parents' house near the Virginia border the day before and were now on their way home.[25] After questioning Pearson, the trooper left him in the patrol car and spoke with Pearson's fiancée, who was still in the couple's car.[26] Her statement was similar to Pearson's, except that she said the couple had visited the defendant's parents in New York.[27]

Trooper Cardwell then returned to his patrol car and radioed Trooper W.J. Gray for assistance.[28] Trooper Cardwell issued Pearson a warning ticket and asked him if he would consent to a search of his vehicle.[29] Pearson assented and signed a consent form.[30] At this point, approximately ten minutes had passed since Pearson and his fiancée had been pulled over.[31] Trooper Gray soon arrived and, upon request from Trooper Cardwell and in accordance with departmental

17. State v. Pearson, 125 N.C. App. 676, 678, 482 S.E.2d 16, 17 (1998), *rev'd*, 348 N.C. 272, 498 S.E.2d 599 (1998).
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See Pearson*, 348 N.C. at 274, 498 S.E.2d at 599.
23. *Pearson*, 125 N.C. App. at 678, 482 S.E.2d at 17.
24. *See Pearson*, 348 N.C. at 274, 498 S.E.2d at 599–600.
25. *See Pearson*, 125 N.C. App. at 678, 482 S.E.2d at 17.
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*
31. *See Pearson*, 348 N.C. at 274, 498 S.E.2d at 600.

standard procedure,[32] frisked Pearson while Cardwell searched the suspect's vehicle.[33] Pearson did not object to the frisk,[34] but seemed "very nervous and excited."[35] During the frisk, Trooper Gray discovered a large, hard, foreign object in Pearson's pants, which he immediately suspected to be narcotics.[36] The troopers removed the object,[37] which consisted of several bags of cocaine and marijuana wrapped in fabric softener strips.[38]

At trial, Pearson filed a motion to suppress the drugs as evidence.[39] The trial court denied the motion,[40] and Pearson subsequently was convicted on two counts of drug trafficking.[41] On appeal, the North Carolina Court of Appeals unanimously held that the frisk was a proper and reasonable protective search justified by the facts and circumstances surrounding the traffic stop.[42] The court of appeals pointed to the following circumstances in arriving at its conclusion that there was a reasonable, articulable suspicion to justify the frisk: (1) the defendant smelled of alcohol; (2) he appeared nervous while talking with Trooper Cardwell; (3) he continued to appear nervous and excited when Trooper Gray arrived; and (4) the defendant and his fiancée gave inconsistent explanations about their travels.[43]

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32. Trooper Cardwell stated that it was standard procedure to pat down all suspects, for safety reasons, every time he searched a vehicle. *See* Transcript of Motion to Suppress at 10, *Pearson*, State of North Carolina General Court of Justice, Superior Court Division, Guilford County (No. 94 CRS 68468-69).

33. *See id.*

34. *See Pearson*, 348 N.C. at 277, 498 S.E.2d at 601. The Superior Court of Guilford County relied on this failure to object in finding that the defendant had consented to the frisk, thereby waiving his Fourth Amendment right to be free from unlawful searches and seizures. *See id.* The North Carolina Court of Appeals did not address the issue of consent or waiver, holding instead that the search was justified under the circumstances. *See Pearson*, 125 N.C. App. at 679, 482 S.E.2d at 18. The North Carolina Supreme Court, however, held that Pearson had not waived his constitutional rights because he had consented only to a search of his vehicle. *See Pearson*, 348 N.C. at 277, 498 S.E.2d at 601; *see also infra* note 49 (discussing Pearson's consent to the search of his vehicle).

35. *Pearson*, 125 N.C. App. at 678, 482 S.E.2d at 17.

36. *See id.* at 679, 482 S.E.2d at 17.

37. *See id.*

38. *See Pearson*, 348 N.C. at 274–75, 498 S.E.2d at 600.

39. *See id.* at 275, 498 S.E.2d at 600.

40. *See id.* In deciding the motion, the court focused on the signed consent form and the fact that the defendant did not object to the frisk. *See id.* These factors, in the trial court's opinion, were sufficient to show that the defendant freely and voluntarily consented to the search. *See id.* at 277, 498 S.E.2d at 601.

41. *See Pearson*, 125 N.C. App. at 677, 482 S.E.2d at 17.

42. *See id.* at 679, 482 S.E.2d at 18.

43. *See id.* Although Trooper Cardwell did not articulate it in any court record, his suspicion of Pearson may have been based on Pearson's fiancée's statement that the

In *Pearson*, the North Carolina Supreme Court unanimously reversed the court of appeals' decision.[44] The supreme court's opinion separately addressed and refuted the significance of nearly every circumstantial factor examined by the court of appeals in its holding that the frisk was justified by a reasonable suspicion.[45] Specifically, the supreme court noted that: (1) Pearson had not consumed enough alcohol to be considered impaired; (2) his nervousness could be explained as a common reaction to being stopped by the police; (3) he was stopped at 3:00 p.m. on an interstate highway;[46] (4) Pearson was polite and cooperative; (5) the troopers were not aware of any criminal record of the defendant; (6) the object in the defendant's pants was not obvious prior to the frisk; (7) the defendant was held for more than ten minutes without making any movements or statements indicating that he was armed; (8) the discrepancy in the statements from the defendant and his fiancée did not by itself show any criminal activity; and (9) the troopers conducted the pat-down search because it was "standard procedure."[47] According to the court, all nine of these factors indicated that the troopers were not acting upon any specific, reasonable suspicion.[48] The court, therefore, concluded that the troopers were not justified in frisking Pearson.[49]

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couple was returning from New York, a known source city for drugs. *See id.*; *see also* Joseph P. D'Ambrosio, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L. REV. 273, 275–76 n.22 (1987) (citing United States v. Mendenhall, 446 U.S. 544, 562 (1980) (noting New York as a drug source city)); Carl Horn, *For the Criminal Practitioner: Review of Fourth Circuit Opinions in Criminal Cases Decided in Calendar Year 1993*, 51 WASH. & LEE L. REV. 159, 164 (1993) (citing United States v. McFarley, 991 F.2d 1188, 1192 (4th Cir. 1993) (same)); Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 230 (1992) (citing *Mendenhall*, 446 U.S. at 562 (same)).

44. *Pearson*, 348 N.C. at 277, 498 S.E.2d at 601.

45. *See id.* at 276, 498 S.E.2d at 601.

46. The court apparently noted the time and location of the stop to show that neither was suspicious. *Cf.* State v. Watkins, 337 N.C. 437, 440, 446 S.E.2d 67, 70 (1994) (noting the time of an incident—3:00 a.m.—as a factor in determining the existence of reasonable suspicion for an investigative stop of a vehicle); State v. Streeter, 283 N.C. 203, 208, 195 S.E.2d 502, 507 (1973) (stating that the defendant's activities justified a pat down partly because of the time of night—2:45 a.m.); State v. Fleming, 106 N.C. App. 165, 168, 415 S.E.2d 782, 784 (1992) (using the time of the observation of suspects—12:00 a.m.—as a factor contributing to articulable grounds for suspecting criminal activity). *But cf.* Terry v. Ohio, 392 U.S. 1, 5 (1968) (noting that the incident in which a reasonable, articulable suspicion was held to exist took place at about 2:30 in the afternoon).

47. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 601.

48. *See id.*

49. *See id.* The court then examined the superior court's holding regarding Pearson's consent to the search. The supreme court held that, in signing the form presented by Trooper Cardwell, Pearson only consented to a search of his car and not to a search of his

The underlying facts in *State v. McClendon* are remarkably similar to *Pearson*, although *McClendon* focused on the constitutionality of an extended investigatory stop rather than on the legality of a frisk. Paul Dennis McClendon was also pulled over on Interstate 85 in Greensboro.[50] Trooper Cardwell, the same officer involved in *Pearson*, ordered another officer, Trooper Brian Lisenby, to stop McClendon's vehicle after seeing McClendon speed and follow another car quite closely.[51] Trooper Cardwell suspected the two vehicles were traveling in tandem, with the lead car acting as a decoy for McClendon's car.[52] While Trooper Cardwell pulled over the lead car, Trooper Lisenby stopped McClendon and asked him to produce his license and registration.[53] McClendon did not produce a registration card, but instead provided a title.[54] Although the title showed the same address as McClendon's driver's license, it was in the name of a different person.[55] McClendon explained that the car belonged to his girlfriend, but when asked her name, he did not respond.[56] Trooper Lisenby then asked McClendon if he was traveling with the other vehicle, and McClendon claimed that he was not.[57] Throughout this conversation, Trooper Lisenby noticed that McClendon was acting nervous—breathing heavily, fidgeting, and not making eye contact with the trooper.[58] When Trooper Lisenby again asked the defendant for his girlfriend's name, he responded "Anna."[59] Lisenby asked "Anna?" to confirm the name, and McClendon replied, "I think so."[60] The name Anna, however, did not appear on the title.[61]

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person. *See id.* at 277, 498 S.E.2d at 601. The court also concluded that Pearson's lack of objection to the personal frisk did not rise to the level of the "clear and unequivocal" consent required to waive Fourth Amendment rights. *Id.* (citing State v. Little, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967)); *see also* Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951) ("The Government must show a consent that is 'unequivocal and specific.' " (quoting Karwicki v. United States, 55 F.2d 225, 226 (4th Cir. 1932))).

50. *See McClendon*, 350 N.C. at 632, 517 S.E.2d at 130.

51. *See id.* at 633, 517 S.E.2d at 130.

52. *See id.*

53. *See id.*

54. *See id.* at 633, 517 S.E.2d at 130.

55. *See id.* at 633, 517 S.E.2d at 130–31.

56. *See id.* at 633, 517 S.E.2d at 130.

57. *See id.* at 633, 517 S.E.2d at 131.

58. *See id.* at 633, 517 S.E.2d at 130.

59. *Id.* at 633, 517 S.E.2d at 131.

60. State v. McClendon, 130 N.C. App. 368, 371, 502 S.E.2d 902, 904 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

61. *See McClendon*, 350 N.C. at 633, 517 S.E.2d at 131. The name appearing on the title was Jema Ramirez. *See id.*

Trooper Lisenby then radioed Trooper Cardwell, who ordered Lisenby to issue McClendon a warning ticket.[62] After doing so, Lisenby asked McClendon if he had any drugs or weapons in the car and if he would consent to a vehicle search.[63] McClendon refused, and Lisenby related the refusal to Cardwell, who had since arrived at the scene of McClendon's stop.[64] Cardwell then began questioning the suspect, asking him questions regarding his travel plans.[65] Cardwell also noticed McClendon's nervousness.[66] McClendon stated that he had spent a few days in Houston, the same city of origin as the suspected decoy vehicle.[67] Based on these circumstances, Cardwell radioed for a drug dog to perform an external sniff of the vehicle.[68] The canine unit arrived approximately fifteen minutes later, and, based on the dog's sniffing, the officers believed they had probable cause to search the car.[69] They found marijuana and arrested McClendon.[70]

At trial, McClendon filed a motion to suppress the results of the search[71] and argued that the original traffic stop was invalid, that the length of the stop subsequent to the issuance of the warning ticket was unreasonable, and that the stop was not based on a reasonable, articulable suspicion that criminal activity was afoot.[72] The trial court held an extensive suppression hearing, drawing out the circumstances of the stop in great detail over several days.[73] Eventually, the trial court held that the troopers had a reasonable, articulable suspicion both to stop the vehicle and to detain McClendon after issuing the warning ticket.[74] McClendon was convicted of trafficking and conspiring to traffic marijuana, sentenced to twenty-five to thirty-five

62. *See id.* at 634, 517 S.E.2d at 131.
63. *See id.*
64. *See id.*
65. *See McClendon*, 130 N.C. App. at 371–72, 502 S.E.2d at 904.
66. *See McClendon*, 350 N.C. at 634, 517 S.E.2d at 131.
67. *See McClendon*, 130 N.C. App. at 370–72, 502 S.E.2d at 903–04; Transcript of Motion to Suppress at 300, *McClendon*, State of North Carolina General Court of Justice, Superior Court Division, Guilford County (Nos. 96 CRS 22468, 96 CRS 28944, 96 CRS 28945).
68. *See McClendon*, 350 N.C. at 634, 517 S.E.2d at 131.
69. *See id.*
70. *See id.*
71. *See McClendon*, 130 N.C. App. at 369, 502 S.E.2d at 903.
72. *See id.* at 374–76, 502 S.E.2d at 906–07; Transcript of Motion to Suppress at 254–56, *McClendon*.
73. *See McClendon*, 130 N.C. App. at 369–74, 502 S.E.2d at 903–06; Telephone Interview with Walter L. Jones, Attorney for Paul Dennis McClendon, Jr. (Oct. 1, 1999).
74. *See McClendon*, 130 N.C. App. at 372, 502 S.E.2d at 905.

months in prison, and fined $15,000.[75]

On appeal, the North Carolina Court of Appeals acknowledged that the period of questioning after the issuance of the warning ticket exceeded the scope of a normal traffic detention, but nonetheless held that the additional detention was based on a reasonable, articulable suspicion of criminal activity.[76] The court based its decision on Trooper Cardwell's stated suspicion that criminal activity was underway[77] and on the supporting articulated facts, including the defendant's nervousness, his uncertainty and confusion regarding his girlfriend's name, his inability to produce the vehicle's registration card, and the troopers' suspicion that McClendon was traveling in tandem with the other vehicle.[78] The court stated that "[w]hile any one of the enumerated factors alone may not be sufficient to show a reasonable suspicion ... we conclude, based on the totality of the circumstances here, the detention [was constitutional]."[79] Judge Wynn dissented, arguing that nervousness and inconsistent or vague responses by drivers or passengers do not give rise to a reasonable, articulable suspicion of criminal activity.[80]

The North Carolina Supreme Court agreed that the police had a reasonable, articulable suspicion that McClendon was engaged in criminal activity based on the totality of circumstances, but the court focused most of its attention on McClendon's nervousness and on his uncertainty regarding his girlfriend's name and the car ownership.[81] Notably, much of the supreme court's analysis was devoted to explaining and distinguishing its holding in *Pearson* regarding the consideration of nervousness in *Terry* Doctrine analyses.[82] The court reiterated and reviewed the *McClendon* trial court's extensive

75. *See id.* at 369, 502 S.E.2d at 903.

76. *See id.* at 378, 502 S.E.2d at 908.

77. *See* Transcript of Motion to Suppress at 108, *McClendon* (noting Trooper Cardwell's belief that McClendon was traveling in tandem with another vehicle that was acting as a decoy and that the two were involved in criminal activity).

78. *See McClendon*, 130 N.C. App. at 378–79, 502 S.E.2d at 908; Transcript of Motion to Suppress at 299–300, *McClendon*.

79. *McClendon*, 130 N.C. App. at 378, 502 S.E.2d at 908.

80. *See id.* at 379, 502 S.E.2d at 909 (Wynn, J., dissenting) (relying on *State v. Pearson*, 348 N.C. at 276, 498 S.E.2d at 601, and *State v. Falana*, 129 N.C. App. 813, 816–17, 501 S.E.2d 358, 360 (1998), to argue that no reasonable, articulable suspicion existed). The only difference between *Pearson* and *McClendon*, in Judge Wynn's opinion, was McClendon's inability to produce a vehicle registration. *See id.* (Wynn, J., dissenting). Judge Wynn, however, believed the lack of a registration card was resolved adequately by McClendon's production of the vehicle's title matching his own address. *See id.* (Wynn, J., dissenting).

81. *See McClendon*, 350 N.C. at 637, 517 S.E.2d at 133.

82. *See id.* at 637–39, 517 S.E.2d at 133–34.

findings during the suppression hearing, specifically noting McClendon's physical appearance and behavior.[83] The court then stated that the nervousness displayed by the defendant in *Pearson* was "not remarkable," while McClendon "exhibited more than ordinary nervousness."[84]

The detailed fact-based analyses used by the North Carolina courts in *Pearson* and *McClendon* date back to the United States Supreme Court's first decision recognizing the legality of frisks even under circumstances that do not satisfy the previously articulated Fourth Amendment standard. In *Terry v. Ohio*, a police officer observed two men "casing" a downtown Cleveland retail store in the middle of the afternoon.[85] The officer testified that he believed the men were planning a robbery and feared that they were armed.[86] When the officer approached them and asked for their names, the men did not answer clearly.[87] The officer then grabbed John Terry, frisked him, and found a gun in his overcoat.[88] At trial, Terry filed a motion to suppress the gun as evidence, claiming the officer did not have the requisite probable cause under the Fourth Amendment to frisk him.[89]

Prior to *Terry*, the Fourth Amendment had been interpreted to require probable cause to justify any governmental search or seizure.[90] Accordingly, previous cases involving Fourth Amendment search and seizure issues had often focused on whether particular police actions constituted "searches" or "seizures."[91] Commentators have referred to this categorical analysis as the "monolithic" approach to the Fourth Amendment.[92] In other words, the Fourth Amendment analysis was rigid—if a police action was considered a

83. *See id.* at 639, 517 S.E.2d at 134.
84. *Id.*
85. Terry v. Ohio, 392 U.S. 1, 6 (1968).
86. *See id.*
87. *See id.* at 7.
88. *See id.*
89. *See id.* at 8.
90. *See* Dunaway v. New York, 442 U.S. 200, 207–09 (1979) (discussing the historical development of Fourth Amendment case law).
91. *See, e.g.*, Katz v. United States, 389 U.S. 347, 353–54 (1967); United States v. Pasquinzo, 334 F.2d 74, 75 (6th Cir. 1964); United States v. Lee, 308 F.2d 715, 717 (4th Cir. 1962).
92. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974) ("The fourth amendment ... is ordinarily treated as a monolith ...."); Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members*, 14 NAT'L BLACK L.J. 1, 17 (1995) (stating that *Terry* "broke the monolith" of Fourth Amendment analysis by recognizing constitutional limitations on searches based upon reasonable suspicion).

search or seizure, the absence of either a warrant or probable cause created a constitutional violation; the reasonableness of the search under the specific circumstances did not matter. In *Terry*, however, the majority's opinion, written by Chief Justice Warren, shifted away from the monolithic analysis and adopted a graduated, or "sliding scale,"[93] approach.[94] The majority held that the extent of the Fourth Amendment's protections depends upon the context of each incident and the reasonableness of the government's action within that context.[95] Consequently, the Court ruled that police may frisk a

93. Amsterdam, *supra* note 92, at 390 (pointing to *Terry v. Ohio* as an example of a case in which the Supreme Court took a sliding scale approach to analyzing an alleged Fourth Amendment violation). "Sliding scale" refers to the concept that the degree of suspicion developed by a police officer should correlate to the degree of the officer's intrusion upon the suspect's privacy. *See id.* at 390–93.

94. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1690–91 (1998) (stating that although the *Terry* Court held that stops and frisks are subject to Fourth Amendment scrutiny, it relaxed the normal demands of the Amendment by applying a reasonableness balancing test instead of requiring probable cause); Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 900 (1998) (noting that the Warren Court created a "sliding scale" exception to the existing probable cause requirement of the Fourth Amendment); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 470 (1990) (explaining that the *Terry* Court acknowledged that brief street stops are sometimes permissible even when there are no grounds for a formal arrest because the stops are much less intrusive than stationhouse detentions).

95. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) ("Of course, the specific content and incidents of this [Fourth Amendment] right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' " (quoting Elkins v. United States, 364 U.S. 206, 222 (1960))).

The *Terry* Court approached the Fourth Amendment issue with some degree of trepidation. Chief Justice Warren, writing for the majority, explained, "We would be less than candid if we did not acknowledge that this [Fourth Amendment] question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court." *Terry*, 392 U.S. at 9–10. The difficulties apparently were amplified by the public's interest in police activities at the time. The Court noted that there had been "practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to 'stop and frisk' . . . suspicious persons." *Id.* at 10. The opinion acknowledged the need for police to be able to act swiftly in certain situations based on observations made in the field. *See id.* at 20. But the Court thought it was "fantastic" to say that a frisk performed by a police officer in public, while the citizen "assumes the position," is a "petty indignity." *Id.* at 16–17. Instead, the Court held that while the Fourth Amendment governs and limits intrusions by the government into personal privacy, it also permits the police to conduct limited, reasonable searches or frisks. *See id.* at 17, 21. The Court reasoned that the central inquiry under the Fourth Amendment is not whether an activity rises to the level of a "search" or "seizure," but rather whether the government's invasion of the person's privacy is reasonable. *See id.* at 19; *see also supra* note 2 and accompanying text

suspect when a reasonably prudent police officer would be justified in believing that the suspect is armed.[96] The belief must be based on "specific reasonable inferences" that officers are "entitled to draw from the facts in light of [their] experience."[97] The Court, however, noted the serious nature of such police actions, characterizing a frisk as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[98]

Significantly, *Terry* left unresolved the relation between stops and frisks and whether separate analyses applied to each type of action. Chief Justice Warren focused entirely on frisks, declining to address whether investigatory seizures, or stops, "upon less than probable cause" were constitutional because he felt it was not clear that such a stop had occurred in that case.[99] In two separate concurrences, however, Justices Harlan and White asserted that a valid stop is a prerequisite to a valid frisk.[100] Justice Harlan opined that in order for an officer to be justified in frisking an individual during an encounter, he must first have constitutional grounds upon which to base the encounter.[101] An officer exercising constitutional authority to detain and question a hostile individual would also necessarily have the authority to frisk the detainee so as to protect himself.[102] Justice White agreed, stating that the temporary stop, "warranted by the circumstances," justifies the frisk.[103] Under the proper circumstances, Justice White believed, a person could be detained briefly against his will while an officer asked him questions.[104]

(describing the function of the Fourth Amendment). Regardless of whether probable cause exists to arrest a suspect, the Court concluded that the police should be permitted to conduct a reasonable search for weapons when there is reason to believe that the suspect is armed and dangerous. *See Terry*, 392 U.S. at 27.

96. *See Terry*, 392 U.S. at 27.

97. *Id.*

98. *Id.* at 17.

99. *Id.* at 19 n.16 (stating that the Court could not tell, based on the record, whether the officer had detained the suspects either by physical force or by show of authority); *see also* Dudley, *supra* note 94, at 895–96 (noting Chief Justice Warren's "instinct" to separate the "frisk" and "stop" issues in *Terry* and discussing the debates among the Justices that led to footnote 16 in *Terry*).

100. *See Terry*, 392 U.S. at 32 (Harlan, J., concurring); *id.* at 34–35 (White, J., concurring).

101. *See id.* at 32 (Harlan, J., concurring).

102. *See id.* at 32, 34 (Harlan, J., concurring).

103. *Id.* at 34 (White, J., concurring).

104. *See id.* (White, J., concurring).

The Court dodged the stop and frisk issue in two other cases[105] before finally addressing it four years after *Terry* in *Adams v. Williams*.[106] The *Adams* Court implicitly adopted Justice Harlan's concurrence in *Terry*,[107] stating that "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."[108] Three years later, the Court explicitly adopted the rationale of Justice Harlan's *Terry* concurrence in *United States v. Brignoni-Ponce*.[109] The *Brignoni-Ponce* Court held the stop in that case to be unconstitutional and acknowledged its adoption of Justice Harlan's concurring opinion in *Terry*, stating that *Terry* and *Adams* "together establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to

105. The Court had its first opportunity to apply the *Terry* Doctrine in two companion cases handed down in a combined opinion on the same day as *Terry*. *See Sibron v. New York*, 392 U.S. 40 (1968); *Peters v. New York*, 392 U.S. 40 (1968). Both cases involved investigatory stop situations rather than frisks, but the Court found other grounds upon which to decide them. In *Sibron*, the Court held that the search of a suspected drug dealer was invalid because the officer's testimony clearly established that the search was for drugs, not weapons. *See Sibron*, 392 U.S. at 64–66. In *Peters*, the Court held that the officer had probable cause to arrest the suspect for burglary based on the officer's observations of the defendant furtively tiptoeing through a building. *See Peters*, *id.* at 66. Because probable cause existed, *Terry* was inapplicable. *See id.*

106. 407 U.S. 143 (1972). The defendant in *Adams* brought a habeas corpus challenge after being convicted of illegally possessing a handgun that an officer found during a stop and frisk. *See id.* at 144. At about 2:15 a.m., an informant told the police officer that an individual in a nearby car was carrying drugs and a gun. *See id.* at 144–45. When the officer approached the car and asked Williams to open the door, he rolled down the window instead. *See id.* at 145. The officer, without seeing a weapon, immediately reached into the car where he thought a gun might be and extracted one. *See id.* Williams claimed that the officer's actions were illegal because he based them merely on a tip from an informant. *See id.* The officer contended that his suspicion was reasonable because he knew the informant, it was dark and the officer could not see inside the car, the defendant did not obey his command, and it was extremely late at night. *See id.* at 146–48. Based on these factors, the Court upheld the officer's action. *See id.* at 149.

107. *See Terry*, 392 U.S. at 31–34 (Harlan, J., concurring); *see also supra* text accompanying notes 100–02 (noting Justice Harlan's concurrence).

108. *Adams*, 407 U.S. at 146 (citing *Terry*, 392 U.S. at 30).

109. 422 U.S. 873 (1975). *Brignoni-Ponce* involved a defendant who was arrested by a border patrol officer while attempting to shuttle illegal aliens into the United States. *See id.* at 874–75. The defendant challenged the U.S. Border Patrol's authority to stop cars and question the occupants about their citizenship while on a roving patrol near the border. *See id.* at 874. The defendant's car was stopped only because the occupants appeared to be of Mexican descent. *See id.* at 875. Other than the apparent ethnicity of the occupants, there were no specific, articulable facts on which the officers based the stop. *See id.* at 885. The Court, therefore, held the investigatory stop to be invalid. *See id.* at 885–87.

arrest or to search for contraband or evidence of crime."[110] Further, the Court held that "[a]s in *Terry*, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' "[111]

From the stop and frisk exceptions to the "monolithic" Fourth Amendment approach, a two-part test has emerged in Supreme Court jurisprudence. With respect to stops, the test is whether a reasonably cautious police officer, based on the totality of the circumstances, has a reasonable, articulable suspicion that *criminal activity is afoot.*[112] After a valid stop has occurred, the test as to the validity of a frisk is whether, under the same conditions, the officer has a reasonable, articulable suspicion that *the suspect is armed and dangerous.*[113]

The Court has since decided several cases further defining the principles of *Terry*. In *Ybarra v. Illinois*,[114] the Court held that the requisite suspicion must be based on specific, articulable facts, that the suspicion must associated with the specific individual, and that the suspicion does not automatically arise merely from the individual's location.[115] Two years after *Ybarra*, in *United States v. Cortez*,[116] the Court focused on the necessity of considering all of the circumstances observed by police.[117] The Court held that two elements must be

110. *Id.* at 881.

111. *Id.* (quoting *Terry*, 392 U.S. at 29).

112. *See Adams*, 407 U.S. at 145–46. The North Carolina Supreme Court has adopted this same test. *See* State v. Butler, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992); State v. Peck, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982).

113. *See Adams*, 407 U.S. at 145–46. North Carolina courts follow the same standard. *See Butler*, 331 N.C. at 233, 415 S.E.2d at 722; *Peck*, 305 N.C. at 741, 291 S.E.2d at 641.

114. 444 U.S. 85 (1979).

115. *See id.* at 91, 93. The defendant in *Ybarra* was a patron at a small tavern for which a search warrant was issued. *Id.* at 88–89. The police had obtained the warrant because they suspected that the bartender possessed drugs and planned to sell them from the tavern. *See id.* at 88. When the police served the warrant, the defendant was patted down along with all the other bar patrons. *See id.* at 88–89. The Court held that proximity to criminal suspects does not rise to the level of a reasonable suspicion justifying a *Terry* frisk. *See id.* at 92.

116. 449 U.S. 411 (1981).

117. *See id.* at 417–18. *Cortez* involved the constitutionality of investigative stops of suspected illegal aliens by U.S. Border Patrol agents. *Id.* at 415–16. After observing some distinctive footprints in the Arizona desert, Border Patrol officers suspected that an ongoing criminal operation was guiding illegal aliens across the United States-Mexico border. *See id.* at 413–14. The officers stationed themselves where they thought the suspects might turn up and spotted a vehicle matching the profile. *See id.* at 415–16. The profile focused on trucks and other large vehicles travelling back and forth on a particular road after midnight. *See id.* at 414–15. The defendants were driving a pickup truck with a camper shell and passed the patrol at 4:30 a.m. headed toward a milepost where unauthorized border crossings had occurred. *See id.* at 415. The truck returned approximately 90 minutes later. *See id.* The court, based on these circumstances, held

present before either a stop or a frisk by police is permissible. First, in analyzing a situation, a police officer must consider all the surrounding circumstances, including, but not limited to, objective observations, any prior police records of the suspect(s), and knowledge of patterns or modus operandi of certain types of criminals.[118] The *Cortez* Court examined cases decided since *Terry* and concluded that "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account."[119] From these factors, the officer is allowed to draw inferences as a trained person in the field of law enforcement.[120] Second, the officer's analysis must generate a "particularized suspicion" that the person is involved in some sort of crime—for a stop—or is armed and dangerous—for a frisk. The Court summarized the standard, stating, "[b]ased upon [the] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."[121]

The North Carolina Supreme Court first applied a *Terry* analysis in *State v. Streeter*.[122] Police stopped and frisked George Streeter after spotting him walking in a business district late at night with a bulge under his shirt.[123] The *Streeter* court followed Justice Harlan's concurrence in *Terry* by applying the reasonable, articulable suspicion standard to an investigative stop situation.[124] The court held that if

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that the officers had a reasonable, articulable suspicion that the suspects were engaged in criminal activity. *See id.* at 421–22.

118. *See id.* at 418.

119. *Id.* at 417.

120. *See id.* at 418.

121. *Id.* at 417–18.

122. 283 N.C. 203, 195 S.E.2d 502 (1973); *see also infra* note 141 (noting that *Terry* was mentioned, but did not apply, in two North Carolina cases decided before *Streeter*).

123. *See Streeter*, 283 N.C. at 208, 195 S.E.2d at 505. A patrolling officer approached Streeter at approximately 2:45 a.m. to determine his reason for being near several businesses and noticed a bulge under his shirt. *See id.* Thinking it was a revolver, the officer frisked the defendant and found burglary tools. *See id.*

124. *Id.* at 210, 195 S.E.2d at 507; *see also* Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) (arguing that a constitutional stop must precede a constitutional frisk); *supra* notes 100–02 (discussing the concurrence). Quoting *Terry*, the North Carolina court recognized the need for law enforcement officers to protect themselves and the general public in situations when probable cause is lacking. *See Streeter*, 283 N.C. at 209–10, 195 S.E.2d at 506 (quoting *Terry*, 392 U.S. at 19, 24). The court concluded that the actions of the officer were "entirely reasonable by Fourth Amendment standards" and that evidence "exposed by [such a] limited weapons search is ... lawfully obtained, and neither the Fourth Amendment nor [state law] excludes it." *Id.* at 210, 195 S.E.2d at 507. The dissent in *Streeter* agreed with the application of *Terry*, but did not agree on the outcome. *See id.* at 211–12, 195 S.E.2d at 507–08 (Higgins, J., dissenting) (citing *Terry*, 392 U.S. at 19). Instead, Justice Higgins argued that the circumstances did not rise to the level required to

the totality of the circumstances leads an officer to believe criminal activity is afoot, the officer may stop the suspect temporarily.[125] Once a suspect has been stopped, if the officer's suspicions of criminal activity are confirmed and the officer has further reason to believe the suspect may be armed and dangerous, a frisk is permissible.[126] Since *Streeter*, North Carolina courts have, for the most part, continued to follow this traditional formulation of the *Terry* analysis.[127]

Viewed in light of this precedent, the North Carolina Supreme Court's decision in *Pearson* appears inconsistent with traditional formulations of the *Terry* Doctrine and with the approach taken in *McClendon*. Specifically, three problems emerge from an analysis of the cases: First, the court in *Pearson* mistakenly applied the *Terry* stop analysis to a frisk situation.[128] Second, the court failed to consider properly the totality of the circumstances in *Pearson*.[129] Lastly, the *Pearson* and *McClendon* courts inconsistently evaluated the importance of the suspects' nervousness.[130]

The first problem is with the test that the North Carolina Supreme Court applied in *Pearson*. After noting that the case focused on the validity of the frisk, the court stated the *Terry* Doctrine as: "When an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries. If he reasonably believes that the person is armed and dangerous, the officer may frisk the person to discover a weapon . . . ."[131] This passage is a proper restatement of the *Terry* Doctrine because a valid stop is a prerequisite to a valid frisk.[132] Nevertheless, the court went on to state: "We cannot hold that the circumstances considered as a whole warrant a reasonable belief that *criminal activity was afoot* or that the

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justify a frisk. *See id.* at 212, 195 S.E.2d at 508 (Higgins, J., dissenting) ("This sort of search is described by the Supreme Court of the United States in these words: 'A general exploratory rummaging.' " (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971))).

125. *See Streeter*, 283 N.C. at 210, 195 S.E.2d at 507.

126. *See id.*

127. *See, e.g.*, State v. Butler, 331 N.C. 227, 233–34, 415 S.E.2d 719, 722–23 (1992) (following the traditional *Terry* analysis); State v. Rhyne, 124 N.C. App. 84, 89, 478 S.E.2d 789, 792 (1996) (same); State v. McGirt, 122 N.C. App. 237, 239, 468 S.E.2d 833, 835 (1996) (same).

128. *See infra* notes 131–38 and accompanying text.

129. *See infra* notes 139–56 and accompanying text.

130. *See infra* notes 157–78 and accompanying text.

131. *Pearson*, 348 N.C. at 275, 498 S.E.2d at 600.

132. *See supra* notes 100, 106–13 and accompanying text.

defendant was armed and dangerous."[133] Furthermore, according to the court, the odor of alcohol on the defendant's breath "should not give rise to a reasonable suspicion of *criminal activity*."[134] Finally, the *Pearson* court noted that "[t]he variance in the statements of the defendant and his fiancée did not show that there was *criminal activity afoot*."[135] The court used this same language in *McClendon* to explain its holding in *Pearson*: "[The circumstances in *Pearson*] were not enough to support a reasonable suspicion that *criminal activity was afoot*."[136]

These statements indicate an application of the *Terry* stop analysis, not the *Terry* frisk analysis. The validity of Trooper Cardwell's actions in pulling Pearson over, however, was not before the court.[137] Instead of focusing on whether criminal activity was

133. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 600 (emphasis added).

134. *Id.* at 276, 498 S.E.2d at 601 (emphasis added).

135. *Id.* (emphasis added).

136. *McClendon*, 350 N.C. at 638, 517 S.E.2d at 133–34 (emphasis added).

137. *See* State v. Pearson, 125 N.C. App. 676, 679, 482 S.E.2d 16, 17–18 (1998), *rev'd*, 348 N.C. 272, 498 S.E.2d 599 (1998). Trooper Cardwell pulled over Pearson because of his erratic driving. *See id.* at 678, 482 S.E.2d at 17. Even though the issue was not raised on appeal, there is some question, based on precedent, as to whether this stop was valid. North Carolina courts have recognized that traveling below the posted speed limit and weaving within one's lane may give rise to a reasonable suspicion justifying the stop of a vehicle to investigate whether the driver is impaired, in violation of N.C. GEN. STAT. § 20-138.1 (1999). In *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989), the court used a "reasonable and experienced" police officer standard to hold that driving 20 miles below the speed limit and weaving were sufficient to support a reasonable suspicion. *See id.* at 395, 386 S.E.2d at 221. On its facts, *Jones* is the North Carolina precedent closest to the fact situation in *Pearson* prior to the traffic stop. Yet, neither the court of appeals nor the supreme court mentioned how far below the speed limit Pearson was driving. If Pearson was travelling closer to the speed limit than the defendant was in *Jones*, he might have been able to argue successfully that the evidence should have been excluded because the initial stop was invalid. If the initial stop was invalid, the *Terry* frisk following the stop also could be held invalid, as any evidence gathered would be tainted by an unlawful seizure. *See id.* at 394, 386 S.E.2d at 220; *see also* ALLEN ET AL., *supra* note 2, § 7, at 604.

Even assuming that the initial traffic stop was valid, an issue still remains as to the constitutionality of the questioning that occurred after Trooper Cardwell ascertained that Pearson was not under the influence and issued him a warning ticket. The defendant could have argued that, once the trooper decided issued the ticket, a separate finding of "reasonably articulable suspicion of criminal activity being afoot" was required to sustain further detention and questioning. *See, e.g.*, United States v. Villota-Gomez, 994 F. Supp. 1322, 1327–28 (D. Kan. 1998) (quoting *United States v. Sandoval*, 29 F.3d 537, 539–40 (10th Cir. 1994), to describe the acceptable ways in which an officer may further question an individual once an initial traffic stop has been completed). If the courts agreed with such reasoning, any evidence gathered in the subsequent frisk could be subject to the exclusionary rule, just as it would be if the original traffic stop were held to be invalid. *See id.*; *see also supra* note 2 (discussing the exclusionary rule).

Pearson did argue during the suppression hearing that the original stop was unreasonably long. *See* Transcript of Motion to Suppress at 44, *Pearson*, State of North

afoot, the court should have determined whether the factors considered would lead a reasonably cautious police officer to suspect that Pearson *was armed and dangerous*. In fact, Pearson's attorney focused on this issue in his brief to the North Carolina Supreme Court, arguing that "[t]here was not the slightest suggestion in the record that defendant posed a danger to anyone."[138]

This mistake is important because asking whether criminal activity is afoot does not always yield the same answer as asking whether a suspect is armed and dangerous. Criminal activity does not necessarily involve weapons. Thus, the reasonable, articulable suspicion required for a stop should not necessarily justify a frisk. While the court may well have reached the same result in *Pearson* if it had used the correct test, confusing the two tests could be determinative in other cases.

The second notable problem is the way in which the North Carolina Supreme Court in *Pearson* evaluated the circumstances upon which Trooper Cardwell based his suspicion. An appellate court in a *Terry* case is allowed considerable discretion in interpreting the facts because the legal determination of the existence of a reasonable, articulable suspicion is subject to de novo review.[139] The

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Carolina General Court of Justice, Superior Court Division, Guilford County (No. 94 CRS 68468-69). The presiding judge, however, concluded that only 10 to 12 minutes had passed from the initial stop until the consent to the search of Pearson's car. *See id.* at 52. Based on this elapsed time, the judge concluded the length of the stop was not unreasonable. *See id.* Pearson did not challenge this ruling before the appellate court.

138. Brief for Appellant at 11, State v. Pearson, 348 N.C. 272, 498 S.E.2d 599 (1998) (No. 165PA97).

139. The facts contained in the "totality of the circumstances" analysis are subject to clear error review. *See* United States v. Glenn, 152 F.3d 1047, 1048 (8th Cir. 1998); United States v. Leshuk, 65 F.3d 1105, 1109 (4th Cir. 1995); United States v. Perrin, 45 F.3d 869, 871 (4th Cir. 1995) (citing United States v. Porter, 738 F.2d 622, 625 (4th Cir. 1984) (en banc)). In other words, the factual findings by lower courts are viewed with great deference and are set aside only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The legal conclusions based on those findings, however, are reviewed de novo with no deference to lower courts' holdings. *See Leshuk*, 65 F.3d at 1109; *Perrin*, 45 F.3d at 871. This de novo review is different from the standard used in determinations of probable cause when a warrant has been issued. Probable cause determinations by magistrates are not subject to de novo review, but instead are subject to a determination of whether " 'the evidence as a whole provided a substantial basis for a finding of probable cause.' " State v. Barnhardt, 92 N.C. App. 94, 96, 373 S.E.2d 461, 462 (1988) (quoting State v. Arrington, 311 N.C. 633, 640, 319 S.E.2d 254, 258 (1984)). The difference between review of a *Terry* case and the review of an issuance of a warrant is rooted in the courts' preference for the warrant process because "it provides an orderly procedure involving judicial impartiality whereby 'a neutral and detached magistrate' can make 'informed and deliberate determinations' on the issue of probable cause." *Id.* (quoting United States v. Ventresca, 380 U.S. 102, 105–06 (1965)).

traditional *Terry* analysis requires consideration of the totality of the circumstances rather than evaluating each circumstance in isolation from the others.[140] North Carolina courts have followed the traditional "totality" test since the state's first in-depth[141] *Terry* analysis in *State v. Streeter*.[142] The *McClendon* opinion continued this tradition by considering the totality of the circumstances,[143] but the *Pearson* opinion considered each circumstance in isolation and, thus, failed to apply the totality test properly.[144]

In *Pearson*, the court searched for individual factors that would be sufficient in themselves to lead a reasonable observer to believe that the defendant was engaged in criminal activity.[145] Although the *Pearson* court professed to have considered the circumstances as a whole and began its opinion by briefly reviewing the facts considered by the court of appeals,[146] the court proceeded to examine each

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Because a police officer makes the initial determination regarding the existence of a reasonable, articulable suspicion in the field, this judicial impartiality is not present in *Terry* situations. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968). As a result, the preference accorded to probable cause determinations by magistrates does not transfer to reviews of *Terry* analyses. *See Glenn*, 152 F.3d at 1048 (stating the de novo review standard); *Leshuk*, 65 F.3d at 1109 (same); *Perrin*, 45 F.3d at 871 (same).

140. *See* United States v. Cortez, 449 U.S. 411, 417–18 (1981).

141. *State v. Woody*, 277 N.C. 646, 178 S.E.2d 407 (1971), and *State v. Robinson*, 15 N.C. App. 155, 189 S.E.2d 567 (1972), both preceded *Streeter* and cited *Terry* as authority. Neither case, however, utilized the *Terry* analysis. *Woody* involved a search incident to a lawful arrest; although the court cited *Terry*, it was not clear why *Terry* was controlling precedent. *Compare Woody*, 277 N.C. at 652, 178 S.E.2d at 410 (stating that probable cause for the defendant's arrest existed and that the search was incident to the arrest), *with* Peters v. New York, 392 U.S. 40, 66 (1968) (stating that *Terry* is inapplicable in situations where police have probable cause for an arrest). In *Robinson*, *Terry* was mentioned only in dicta, as the court noted that the search in the case was not challenged as an unreasonable investigatory stop. *See Robinson*, 15 N.C. App. at 156, 189 S.E.2d at 568.

142. State v. Streeter, 283 N.C. 203, 210, 195 S.E.2d 502, 507 (1973).

143. *McClendon*, 350 N.C. at 637, 517 S.E.2d at 133.

144. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 600–01 (scrutinizing every factor considered by the lower court and finding that none supported a reasonable, articulable suspicion); *see also* Ybarra v. Illinois, 444 U.S. 85, 93 (1979) ("[T]he State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous."). *Ybarra*'s language also differs somewhat from the traditional "totality of the circumstances" test set forth by the *Terry* Court and later restated in cases such as *United States v. Cortez*, 449 U.S. at 417. The *Ybarra* majority's opinion did, in fact, meet with dissent, as Chief Justice Burger and Justices Blackmun and Rehnquist argued that the majority "overlook[ed] the practicalities of the situation" in holding that the search was invalid in that case. *Ybarra*, 444 U.S. at 97 (Burger, C.J., dissenting).

145. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 601.

146. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 600 ("We cannot hold that the circumstances considered as a whole warrant a reasonable belief that criminal activity was afoot or that the defendant was armed and dangerous.").

circumstance individually.[147] The *Pearson* court's examination of individual facts may stem from a misreading of *Terry*. To be sure, the *Terry* Court used the same technique,[148] but after discounting every circumstance individually in that case, the Court took an additional step and added the elements together to determine what sort of picture the cumulative facts painted.[149]

In contrast to the *Pearson* analysis, the *McClendon* court focused on the totality of the circumstances.[150] The court viewed the circumstances only in combination with each other, never discounting or exclusively analyzing the factors individually as it had done in *Pearson*.[151] The difference in these two approaches to the *Terry* analysis is illustrated in the State's brief to the North Carolina Supreme Court in *McClendon*. There, the assistant attorney general noted that the defendant's "analytical approach is piecemeal: they dissect the circumstances and explain them singly in a way consistent with innocence and with no recognition that the circumstances considered as a whole could also be consistent with criminal activity."[152] The State's brief argued that "the more appropriate perspective as taught by *Terry* is not to consider the acts separately . . . [but] to consider whether the acts taken together warrant further investigation notwithstanding that individually they may appear innocuous."[153] The opinion in *Pearson* wrongly suggested that the facts exclusively should be analyzed and argued individually.

As *Terry* and subsequent cases have recognized, the fundamental reason for viewing the circumstances together is that multiple, seemingly innocuous factors can create a reasonable, articulable suspicion justifying a stop or frisk when viewed collectively.[154] As one trial court has noted, "[i]ndividually, any of the factors cited [in a *Terry* case] might not justify a search, but one cannot piecemeal this analysis. One piece of sand may not make a beach, but courts will not be made to look at each grain in isolation and conclude there is no

147. *See id.* at 276, 498 S.E.2d at 601.

148. Terry v. Ohio, 392 U.S. 1, 22–23 (1968).

149. *See id.*

150. *McClendon*, 350 N.C. at 639, 517 S.E.2d at 134.

151. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 600–01.

152. Brief for Appellee at 26, State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999) (No. 392A98).

153. *Id.* at 26–27.

154. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 9–10 (1989); Florida v. Royer, 460 U.S. 491, 525 (1983) (Rehnquist, J., dissenting); Terry v. Ohio, 392 U.S. 1, 22–23 (1968); State v. Andrews, 565 N.E.2d 1271, 1274 (Ohio 1991).

seashore."[155] Admittedly, a cumulative evaluation of the facts in *Pearson* probably would not have supported a reasonable, articulable suspicion.[156] It is clear, however, that the court did not apply the

155. Commonwealth v. Shelly, 703 A.2d 499, 503 (Pa. Super. Ct. 1997). Police officers in this case frisked the defendant after they stopped the automobile in which she was a passenger. *See id.* at 501.

156. Because Pearson's frisk was at issue, *Terry* requires that Trooper Cardwell had a reasonable, articulable suspicion that Pearson was armed and dangerous. *Terry*, 392 U.S. at 27. There appears to have been no such suspicion or supporting articulated facts in the case, although the opinion is somewhat vague on that point because the supreme court did not fully address the issue, focusing instead on the suspicion of criminal activity. *See supra* notes 46–48, 131–38.

The transcript of the suppression hearing in *Pearson* suggests that Trooper Cardwell suspected that Pearson could have been, among other things, trafficking drugs. *See* Transcript of Motion to Suppress at 8, *Pearson*, State of North Carolina General Court of Justice, Superior Court Division, Guilford County (No. 94 CRS 68468-69) (noting that Trooper Cardwell asked Pearson if he had any drugs, weapons, or stolen property in his car). The frisk of Pearson flowed from the search of the vehicle, where one would expect to find any large quantities of drugs being transported. Considering the language in *Terry* allowing an officer to use his experience in viewing the totality of the circumstances, such circumstances could add up to substantive suspicion of a crime at some point even if each circumstance is meaningless individually. *See Terry*, 392 U.S. at 27. However, the record shows that Trooper Cardwell never specifically articulated that he had suspected Pearson of running drugs in either the suppression hearing or the trial. If Trooper Cardwell had done so and had supported the suspicion with his experience and observations of Pearson, the State may have had a plausible argument that the frisk was reasonable. A number of jurisdictions have upheld similar officer conduct in cases dealing with suspected transportation of large quantities of drugs based on the reasoning that weapons are "tools of the drug trade." *See, e.g.*, United States v. Woodall, 938 F.2d 834, 836 (8th Cir. 1991) (holding that police information identifying a suspect of manufacturing drugs and as being involved with a narcotics dealer justified a frisk); United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989) (upholding a frisk based on the fact that police observed the defendant with a known drug dealer who met with another dealer in order to exchange drugs); United States v. Anderson, 859 F.2d 1171, 1177 (3d Cir. 1988) (ruling that police actions were justified when officers frisked the defendant after finding a large sum of money, suspected to come from drug dealings, on him, because "persons involved with drugs often carry weapons"); United States v. Trullo, 809 F.2d 108, 113 (1st Cir. 1987) (upholding weapons frisks, during a seizure, of defendants suspected of major drug trafficking); United States v. Vasquez, 634 F.2d 41, 43 (2d Cir. 1980) (holding that frisks of defendants involved in major drug trafficking are valid, especially in light of the "violent nature of narcotics crime"); United States v. Cotton, 708 F. Supp. 841, 845 (W.D. Tenn. 1989) (upholding frisks of suspects involved in "substantial" drug activities because such individuals may be armed and dangerous); Caffie v. State, 516 So. 2d 822, 828 (Ala. Crim. App. 1986) ("We recognize that under certain circumstances, for example, where the authorities are dealing with an individual suspected of trafficking in large quantities of narcotics, they may be authorized to automatically frisk the suspect."), *aff'd sub nom. Ex parte* Caffie, 516 So. 2d 831, 837 (Ala. 1987); Williams v. Commonwealth, 354 S.E.2d 79, 87 (Va. Ct. App. 1987) (stating that police may frisk individuals suspected of either drug distribution or possession); *see also* David A. Harris, *Particularized Suspicion, Categorical Judgment: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 1002–03 n.111 (1998) (listing additional cases with similar holdings).

Terry analysis consistently and that the discrepancy could be determinative in some cases. *Pearson*'s piecemeal approach has the potential to undermine police authority in quickly developing street conditions, lead to analytical confusion among lower courts, and send an inconsistent message to defendants as to how the facts of each case will be analyzed. These results are particularly unfortunate because the court had another means at its disposal for achieving the same result in *Pearson*. The court could have held that, while the totality of circumstances may have justified a suspicion of criminal activity—and, thus, the initial stop—the circumstances did not support a reasonable, articulable suspicion that Pearson was armed and dangerous—and, thus, the subsequent frisk.

Finally, *McClendon* and *Pearson* are inconsistent in their treatment of a suspect's nervousness as a possible ground for suspicion. North Carolina appellate courts have had several opportunities to deal with nervousness displayed by suspects. In *State v. Butler*,[157] for example, police spotted the suspect in a high drug-crime area; the suspect walked away suspiciously after making eye contact with the officers.[158] The supreme court held that the resulting investigatory stop was valid based on the totality of the circumstances,[159] citing a Louisiana case in which the court had held that a suspect's nervousness alone could be a basis for reasonable suspicion.[160] Four years later in *State v. Rhyne*,[161] police frisked a suspect after receiving a tip that there were drug dealers in the area where he was spotted.[162] Although the North Carolina Court of Appeals considered the suspect's nervousness, it held the search to be invalid because the suspect did not display any other suspicious behavior.[163]

157. 331 N.C. 227, 415 S.E.2d 719 (1992).

158. *See id.* at 233–34, 415 S.E.2d at 722–23.

159. *See id.* at 233, 415 S.E.2d at 722.

160. *See id.* at 234, 415 S.E.2d at 723 (citing State v. Belton, 441 So. 2d 1195, 1198 (La. 1983)).

161. 124 N.C. App. 84, 478 S.E.2d 789 (1996).

162. *See id.* at 85–86, 478 S.E.2d at 790.

163. *See id.* at 90–91, 478 S.E.2d at 792–93. In another recent case involving Trooper Cardwell, *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998), the court of appeals followed the supreme court's opinion in *Pearson* and held that the defendant's nervous conduct and vague travel plans did not rise to the level of a reasonable, articulable suspicion. *See id.* at 817, 501 S.E.2d at 360. The facts in *Falana* apparently were not as damaging as those in *Pearson*. Trooper Cardwell testified that the defendant in *Falana* was breathing rapidly and periodically paused in his speech to swallow. *See id.* at 815, 501 S.E.2d at 359. Moreover, the stories given by the defendant and his passenger contained only minor discrepancies in comparison to *Pearson*. The stop took place on Wednesday; Falana stated that the couple had been in New Jersey visiting friends for three days, *see id.*

In light of this precedent, it seems anomalous that the North Carolina Supreme Court in *Pearson* stated that "[t]he nervousness of the defendant [was] not significant. Many people become nervous when stopped by a state trooper."[164] The plain meaning of this statement appears to be that the court would not consider mere nervousness in evaluating the existence of a reasonable, articulable suspicion. In *McClendon*, however, the court emphasized the defendant's nervousness and, at the same time, tried to clarify its holding in *Pearson*. The *McClendon* court concluded that Pearson's nervousness had not risen to a significant level[165] and explained that the *Pearson* opinion "did not mean to imply . . . that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot."[166] In fact, both the court of appeals and supreme court held that McClendon's nervousness was so pronounced that it was reasonable to consider in the totality of the circumstances.[167] The supreme court explained that Pearson's nervousness "was not remarkable . . . [but that McClendon] exhibited more than ordinary nervousness."[168] In arriving at this conclusion, however, the court merely listed the factors in McClendon's stop that were discussed by the court of appeals[169] without specifically comparing those factors to the fact pattern in *Pearson*.

The *McClendon* court's effort to distinguish *Pearson* is problematic for two reasons. First, the supreme court admitted in *McClendon* that it had not considered Pearson's nervousness as part of the totality of the circumstances in that case. The court tried to downplay this mistake by stating that "[e]ven when taken together with the [other circumstances in *Pearson*], it did not support a reasonable suspicion."[170] This belated conclusion, however, does not make up for the fact that the court did not properly consider Pearson's nervousness and leaves a lingering issue for future litigants. Even if Pearson's nervousness, properly considered, would not have amounted to a reasonable suspicion, the *Pearson* opinion's analysis of

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at 814, 501 S.E.2d at 359, while Falana's girlfriend stated that the couple had been in the same state for the same purpose since "Saturday or Sunday," *id.* at 815, 501 S.E.2d at 359.

164. *Pearson*, 348 N.C. at 276, 498 S.E.2d at 601.

165. *McClendon*, 350 N.C. at 639, 517 S.E.2d at 134.

166. *Id.* at 638, 517 S.E.2d at 134.

167. *See id.* at 639, 517 S.E.2d at 134; State v. McClendon, 130 N.C. App. 368, 378, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

168. *McClendon*, 350 N.C. at 639, 517 S.E.2d at 134.

169. *See id.* at 637–39, 517 S.E.2d at 133–34.

170. *Id.* at 639, 517 S.E.2d at 134.

the factor should serve as a warning flag for future *Terry* cases. In trying to justify its analysis in *Pearson*, the court appears to have concluded that a suspect's nervousness would have to meet some unspecified threshold before it would be considered within the totality of the circumstances. *Terry* and its progeny, however, do not require such a threshold. Instead, the cases hold that, if the circumstance existed and was noticed by the officer, it should be considered by the court as part of the totality of the circumstances.[171]

Second, the difference between Pearson's and McClendon's nervousness is not clear and could very well be far less than the *McClendon* opinion suggested. Much of the detail regarding McClendon's nervousness comes from the work of the State's attorney at the suppression hearing, in which he had Trooper Cardwell itemize several times McClendon's physical characteristics and behavior during the original stop.[172] While the supreme court in *McClendon* reasoned that Pearson's nervousness was not remarkable, both troopers in *Pearson* testified that he exhibited increasing nervousness throughout the traffic stop and subsequent questioning, describing him as "very nervous and excited."[173] Neither side at Pearson's suppression hearing elicited testimony regarding the specific physical characteristics of his nervousness. In *McClendon*, on the other hand, the supreme court described McClendon as "extremely nervous."[174] Based on this record, it is difficult to tell whether McClendon really was more nervous than Pearson, or whether the court merely received a more detailed description of

171. *See supra* notes 97–98, 116–21, 154–56 and accompanying text.

172. *See* Transcript of Motion to Suppress at 104, 110, *McClendon*, State of North Carolina General Court of Justice, Superior Court Division, Guilford County (Nos. 96 CRS 22468, 96 CRS 28944, 96 CRS 28945); Telephone Interview with Walter L. Jones, *supra* note 73.

173. State v. Pearson, 125 N.C. App. 676, 678–79, 482 S.E.2d 16, 17 (1998), *rev'd*, 348 N.C. 272, 498 S.E.2d 599 (1998). The court of appeals in *McClendon* also emphasized the difference in Pearson's and McClendon's nervousness, stating that the circumstances in *McClendon* "extend[ed] well beyond those found in *Pearson*." *McClendon*, 130 N.C. App. 368, 378, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999). In reviewing the factors in both cases, however, there appears to be little difference. The similarities include: (1) the defendants were pulled over for a minor traffic violation; (2) Trooper Cardwell pulled over the suspects in both cases; (3) the stops occurred on Interstate 85 in Guilford County in the afternoon; (4) the defendants acted nervous when questioned by the trooper; (5) the defendants' replies to Trooper Cardwell's questions were vague and inconsistent; (6) the defendants were only issued a traffic warning; (7) and Trooper Cardwell held the defendants after the warnings were issued and asked for consent to search the cars. *See Pearson*, 348 N.C. at 274–75, 498 S.E.2d at 599–600; *McClendon*, 130 N.C. App. at 369–74, 502 S.E.2d at 903–06.

174. *McClendon*, 350 N.C. at 637, 517 S.E.2d at 133.

McClendon's nervousness because of the prosecutor's efforts at the suppression hearing. The prosecutor in *McClendon* questioned Trooper Cardwell extensively about the defendant's physical characteristics.[175] This extensive questioning and the resulting record translated to extensive reviews and evaluations in the court of appeals'[176] and supreme court's[177] opinions in *McClendon.* It seems that the courts, bound by the trial court's findings, treated the detailed description of McClendon's physical appearance as evidence of greater nervousness than the defendant's in *Pearson.*[178]

Taken together, *Pearson* and *McClendon* seem likely to lead North Carolina courts to focus even more attention on parsing the particular degree of nervousness required in order to consider the factor relevant to a *Terry* analysis. Yet considering the traditional *Terry* analysis and its directive to consider all of the circumstances, such a threshold test would be improper. The reviewing courts are bound by the trial court records in evaluating factors such as nervousness, but the inconsistent treatment of nervousness within the totality of the circumstances could lead to problems for defense and prosecuting attorneys in predicting the factor's importance. Unless North Carolina courts clarify their treatment of nervousness in *Terry* cases, attorneys on both sides probably will have to ensure that thorough and extremely detailed descriptions of the nervous characteristics of defendants are entered into the records of their cases. Inconsistent treatment of nervousness also could create problems for police in weighing the nervousness of suspects encountered in the field and determining when such characteristics rise to the requisite level under *Terry.*

The North Carolina Supreme Court's decisions in *Pearson* and *McClendon* demonstrate the difficulties in applying the *Terry* Doctrine to different fact patterns. Some of the confusion stems from the subjective nature of the balancing test itself. The line between

175. *See* Transcript of Motion to Suppress at 104, 110, *McClendon*; Telephone Interview with Walter L. Jones, *supra* note 73.

176. *See McClendon*, 130 N.C. App. at 369–78, 502 S.E.2d at 903–08 (recounting McClendon's physical characteristics, including the sweat beading on his forehead and his trembling hands).

177. *See McClendon*, 350 N.C. at 637, 639, 517 S.E.2d at 134 (recounting McClendon's sweating, rapid breathing, and heavy sighing).

178. *See id.* at 639, 517 S.E.2d at 134 (comparing McClendon's nervousness to Pearson's); *Pearson*, 348 N.C. at 274, 498 S.E.2d at 599 (containing a very limited description and consideration of Pearson's nervousness); Transcript of Motion to Suppress at 6, 33, *Pearson*, State of North Carolina General Court of Justice, Superior Court Division, Guilford County (No. 94 CRS 68468-69) (noting Trooper Cardwell's brief description of Pearson's nervousness).

what is and what is not a reasonable, articulable suspicion is often blurred. The United States Supreme Court in *Terry* and its progeny has provided various analytical tools to help lower courts in their balancing process and in determining the existence of reasonable, articulable suspicion.[179] By trying to distinguish *Pearson* from *McClendon*, the North Carolina Supreme Court has created some confusion about how *Terry* should be applied. As between the two cases, *McClendon* is more in line with the traditional *Terry* analysis. To clarify the doctrine's status further, it would be helpful for the court to: (1) apply the correct *Terry* analysis and associated language, depending on the issue at hand—a stop, frisk, or both; (2) consider the totality of the circumstances as a whole in every case and refrain from evaluating factors individually without considering their cumulative impact; and (3) consider a suspect's nervousness consistently as a part of the totality of the circumstances. Although fact-specific inquiries into the reasonableness of officers' suspicions will always be intricate, North Carolina courts and litigants would benefit significantly from a more consistent application of the *Terry* Doctrine.

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179. *See supra* notes 93–94, 96–97, 112–21 and accompanying text.